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Remedies—Equitable Remedies for Violation of Antitrust Laws—Joint Research Ventures in Pollution Control—In re Multidistrict Vehicle Air Pollution v. Automobile Mfrs. Ass'n, 538 F.2d 231 (9th Cir. 1976).

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In 1969, the four major automakers and their trade association, Automobile Manufacturers Association, consented to a decree of the district court designed to prevent their conspiring to restrain the development and installation of antipollution devices in violation of section 1 of the Sherman Act. At the same time, there arose a concerted movement among various individuals, classes, and governmental ent-

1. American Motors Corp., Chrysler Corp., Ford Motor Co., and General Motors Corp.
3. The consent decree was not an admission of the conduct alleged; it merely prescribed future participation in the types of antitrust activities itemized in the decree. 1969 Trade Cas. ¶ 72,907, at 87,457 (C.D. Cal.).
4. 15 U.S.C. § 1 (1970). In pertinent part, the consent decree enjoined any conspiracy:
   (1) To prevent, restrain or limit the development, manufacture, installation, distribution or sale of air pollution control equipment for motor vehicles;
   (2) Adhering to agreements with reference to patents and patent rights.
5. During the pendency of the government suit which culminated in the aforementioned consent decree, the individuals, cities, counties, states and other governmental agencies were denied intervention as party plaintiffs to assert their treble damages claims. United States v. Automobile Mfrs. Ass'n, 1970 Trade Cas. ¶ 73,070, at 88,203-4 (C.D. Cal.). The claimants then filed a new action for treble damages in which they successfully opposed a motion to dismiss for lack of a "commercial relationship" between themselves and defendants. In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equip., 1970 Trade Cas. ¶ 73,318, at 89,255 (C.D. Cal.).
6. During the pendency of the government suit which culminated in the aforementioned consent decree, the individuals, cities, counties, states and other governmental agencies were denied intervention as party plaintiffs to assert their treble damages claims. United States v. Automobile Mfrs. Ass'n, 1970 Trade Cas. ¶ 73,070, at 88,203-4 (C.D. Cal.). The claimants then filed a new action for treble damages in which they successfully opposed a motion to dismiss for lack of a "commercial relationship" between themselves and defendants. In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equip., 1970 Trade Cas. ¶ 73,318, at 89,255-56 (C.D. Cal.). See generally 24 VAND. L. REV. 126 (1970). The victory was brief, however, and the war was lost when the Ninth Circuit reversed an interlocutory order and denied all plaintiffs standing for damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970). Standing was unavailable to those claimants, excepting the farmers claiming injury to crops, on the basis of lack of "commercial injury." Standing was denied to the farmers since they were outside the "target area" of the alleged violation. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973), noted in Note, Use of Antitrust Law as Environmental Remedy for Suppression of Pollution Control Technology, 15 B.C. IND. & COM. L. REV. 813 (1974) [hereinafter cited as Antitrust Law]; Comment, Antitrust—The Ninth Circuit Grants a Section 16 Clayton Act Plaintiff Standing to Sue
ties to alleviate continuing economic and environmental injury⁶ caused by pollutants needlessly emitted from under-equipped automobiles manufactured during the fourteen year period of the alleged conspiracy.⁷

Even Though as a Section 4 Plaintiff He Is Not on the Firing Line, 5 LOY. CHI. L.J. 655 (Winter 1974). The same decision, however, did grant plaintiffs standing to assert equitable remedies under section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), but with an express reservation of judgment as to the merits of plaintiff's claims and to the availability of injunctive relief for such claims. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra at 131. The equitable remedies of restitution and mandatory injunction requested, discussed in notes 20-25 infra and accompanying text, were found unavailable by the district court in In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 367 F. Supp. 1298 (C.D. Cal. 1973), aff'd sub nom. In re Multidistrict Vehicle Air Pollution v. Automobile Mfrs. Ass'n, 538 F.2d 231 (9th Cir. 1976).

6. The injuries alleged by the plaintiffs to the original action decided in 1970, see note 5 supra, In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equip., 1970 Trade Cas. ¶ 73,318, at 89,255 (C.D. Cal.), varied according to class:

[T]he governments claimed that they had been injured by damage to public buildings and greenery, increased benefits to welfare clients suffering from pollution-related diseases, and increased expenditures to combat air pollution. The suit on behalf of all farmers in the United States claimed crop damage resulting from air pollution.


7. The cross-licensing agreement among auto manufacturers, which was the subject of the consent decree entered in 1969, was formalized by its members in 1955. J. ESPOSTO, VANISHING AIR, THE NADER REPORT 41 (1970).

Complaints against the auto manufacturers focused on the activities of the “cross-licensing” agreement entered into between the major automobile manufacturers, the Automobile Manufacturers Association and certain smaller companies. The agreement provided for royalty-free exchange of patents acquired from members and third parties and for uniform licensing terms. Lanzillotti & Blair, Automobile Pollution, Externalities and Public Policy, 18 ANTITRUST BULL. 431, 442 n.17 (1973) [hereinafter cited as Automobile Pollution]. In addition to the patent licensing provisions, the agreement provided for the signers to pool their research and development information. Brief for Appellee Chrysler Corp. at 9-10, In re Multidistrict Vehicle Air Pollution v. Automobile Mfrs. Ass'n, 538 F.2d 231 (9th Cir. 1976). The consent decree resulted in the break-up of both aspects of the venture. United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,907 at 87,456 (C.D. Cal.). In their briefs to In re Multidistrict Vehicle Air Pollution appellants accused the auto corporations of generally effecting a delay in pollution abatement and installation of antipollution devices by: (1) imposing uniform installation and announcement dates on cooperating members; (2) jointly reducing personnel and funds (up to 60%) for pollution control; (3) diluting California exhaust standards; (4) opposing changes to California pollution control device (“PCD”) certification requirements which would have assisted independent manufacturers; (5) suppressing emission control development information to technicians and public officials outside the conspiracy; and (6) delaying application for certification of Chrysler's “Clean Air Package.” Brief for Appellant at 31-35, In re Multidistrict Vehicle Air Pollution v. Automobile Mfrs. Ass'n, 538 F.2d 231 (9th Cir. 1976).

The auto manufacturers claimed that consumer reluctance and inadequate state cooperation were the major contributors to the delay, if any, and that without research coopera-
The recent Ninth Circuit ruling in *In re Multidistrict Vehicle Air Pollution v. Automobile Manufacturers Association* held that the remedies of restitution and mandatory "retrofit" of all automobiles under-equipped as a result of the alleged antitrust conspiracy were unavailable under the federal antitrust laws. This decision followed an earlier Ninth Circuit judgment granting the same twenty-two state and certain county, city and individual appellants standing to sue for equitable relief under section 16 of the Clayton Act.


8. 538 F.2d 231 (9th Cir. 1976).
9. The restitution claim was for reimbursement of expenses incurred by auto owners who had voluntarily retrofitted their automobiles and as reimbursement for costs imposed on persons who voluntarily compensated for the incremental pollution through other pollution control measures. Brief for Appellants at 30, *In re Multidistrict Vehicle Air Pollution v. Automobile Mfrs. Ass'n*, 538 F.2d 231 (9th Cir. 1976).
10. "Retrofit" is the installation of presently available pollution control devices on all automobiles not presently so equipped and the updating of certain pollution control devices to present day technological levels. 538 F.2d at 234 n.3.
11. *Id.* at 234. The remedies were sought pursuant to the Clayton Act, § 16, 15 U.S.C. § 26 (1970).
Section 16 of the Clayton Act provides for equitable relief against "threatened loss or damage by a violation of the antitrust laws."\(^4\) Injuries remediable under this section are, by the Ninth Circuit's own measure, injuries "to any interest cognizable in equity,"\(^5\) including injury to the environment.\(^6\) The lesson of Multidistrict Vehicle Air Pollution is that proof of a "cognizable" injury, standing alone, will not secure a remedy under section 16. It must also be shown that the form of remedy requested fits the language and purposes of the Clayton Act.

The district court in Multidistrict Vehicle Air Pollution opined that the remedies requested were more suitable to an action in nuisance than to an action in antitrust.\(^7\) The Ninth Circuit affirmed the district court's opinion, relying with more particularity on a literal reading of section 16 and on the general antitrust enforcement policies underlying the Clayton Act. Restitutionary relief, in the form of compensation to those persons who had voluntarily retrofitted their automobiles, was denied by the Ninth Circuit on the ground that such expenses constituted "past" losses. Relief for losses incurred in the past is not provided for in section 16, which is limited by its terms to protection from "threatened" (i.e., future) loss or damage.\(^8\) Past expenses are recoverable, the court said, only under section 4 of the Clayton Act;\(^9\) under this section, however, the appellants were found to have no standing to

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\(^{14}\) Id.

\(^{15}\) Id.


\(^{17}\) In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 130-31 (9th Cir.), cert. denied, 414 U.S. 1045 (1973).


\(^{19}\) The text of section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), may be found in note 13 supra.


Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained . . .

Id.
sue.\textsuperscript{20} The second form of relief sought, that of compelling the automakers to retrofit automobiles with up-to-date pollution control devices, was refused on the ground that the remedy served no antitrust goal of enjoining or threatened antitrust conduct or of redressing injuries to the competitive system.\textsuperscript{21}

The appellants' contention in \textit{Multidistrict Vehicle Air Pollution} signified the first attempt to use antitrust law as a solution to widespread environmental pollution\textsuperscript{22}—a problem of recent attack under federal legislation\textsuperscript{23} and, to a much lesser extent, under nuisance law.\textsuperscript{24} Although the instant case does not resolve the question of whether the acts

\textsuperscript{20} See note 5 supra.

\textsuperscript{21} 538 F.2d at 235. The following cases were cited by the court demonstrating the use of antitrust remedies to enjoin ongoing conduct on the basis of injuries unrelated to the competitive system: Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) (injunction under section 16 enjoining railroad companies from conspiring to fix rates to the detriment of Georgia's economy); Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (enjoining conspiracy of Board of Realtors to prevent blacks from purchasing or renting homes). Other decisions were cited for the proposition that antitrust remedies under section 16 of the Clayton Act could be used to undo past injuries to the competitive system where there was no showing of ongoing conduct: United States v. Glaxo Group Ltd., 410 U.S. 52, 60-64 (1973) (approving nondiscriminatory sales and licensing of patents to break up pooling agreements); Ford Motor Co. v. United States, 405 U.S. 562, 573-75 (1972) (approving divestiture of a company to restore pre-acquisition market structure); United States v. United States Gypsum Co., 340 U.S. 76, 93-94 (1950) (approving that violators of the Sherman Act may be required to license patents at prescribed rates and sell products according to prescribed terms). The retrofit remedy sought by appellants did not fall into either of these groups of cases, but was, instead, a request for a decree broadly designed to eliminate air pollution and not really to further the purposes of the antitrust laws. 538 F.2d at 234-35. See text accompanying notes 92-96 infra.


of the automakers were illegal under the antitrust laws, *Multidistrict Vehicle Air Pollution* raises the possibility than an antitrust remedy for environmental injury can exist under properly stated circumstances.\(^2\) The purpose of this note is to discuss the problem of proving that joint research and development agreements are violative of antitrust law and then, assuming the existence of such a violation, to examine the Ninth Circuit's analysis of the availability of equitable relief under section 16 of the Clayton Act and the restraints that analysis places on environmental, as well as other potential, antitrust litigants.

I. THE ANTITRUST VIOLATION

*Multidistrict Vehicle Air Pollution* is the first case to directly raise the issue of the legality of joint research and development agreements among competitors in the same industry.\(^6\) In the absence of any standard for testing such agreements under the antitrust laws,\(^2\) the Ninth Circuit decided the instant case on the grounds of failure to state a remedy under the Clayton Act.\(^2\) The court thus declined to pass on the district court's finding that the automakers had not violated the antitrust laws.\(^2\)

One cannot readily criticize the circuit court's avoidance of the issue, for the policy considerations inherent in an antitrust analysis of joint research and development ventures are especially acute in the context of pollution control. All citizens want clean air and water, but few are willing to pay its high costs. The automakers have little incentive to pioneer antipollution research since such devices do not generally enhance the value or performance of the auto. Increased retail prices to cover costs of research and development inevitably reduce new car sales. Jointly administered research and development programs have the ameliorative effect of spreading the risk and cost of pollution control among the several participants. This maximizes the benefits of research by reducing the duplication of effort.\(^5\)

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25. See text accompanying notes 71-73 & 86 infra.
27. See note 41 infra.
29. See note 45 *infra* and accompanying text.
Nevertheless, the joint research agreement may be abused to the effect that it excludes independent research by nonmembers.\(^3\) This, in turn, might lead to the exclusion of third party invention from the marketplace.\(^2\) In times of public concern about environmental safety, a monopolization of research information might be used to create false appearances as to the true state of the art.\(^3\)

In determining the legality of such ventures in the field of pollution control, there is the additional problem of weighing the amount of social responsibility which can be fairly attributed to profit oriented private industry. In the absence of specific state-imposed standards, it is unlikely that consumers would unilaterally undertake pollution control measures which add to their cost of living.\(^3\) It is perhaps reasonable that no higher a sense of morality be imposed on private industry. However, where state standards exist, anticompetitive conduct in research and development might properly be dealt with through antitrust controls.

The antitrust laws provide a mechanism whereby these considerations can be integrated into a judicial determination of whether or not a joint research and development agreement violates section 1 of the Sherman Act.\(^3\) The so-called "rule of reason"\(^3\) standard for antitrust violations relies on the proposition that a restraint of trade is not illegal unless "unreasonable."\(^3\) The "rule of reason" is essentially a balancing of several factors\(^3\) to arrive at a decision which is most fair in view

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31. Air Pollution, supra note 26, at 481.
33. See note 7 supra describing specific allegations in this regard.
34. Automobile Pollution, supra note 7, at 436.
36. The "rule of reason" was first enunciated in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).
38. In Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), the following factors were relevant to an application of the "rule of reason:")

"[T]he facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect,
of the purposes of the alleged anticompetitive activity.

The agreement among the automakers in the instant case was potentially illegal in two respects: (1) the cross-licensing of patents, and (2) the suppression of competition in the research and development of pollution control technology. Cross-licensing agreements among competitors can be illegal “when used to effect a monopoly, or to fix prices, or to impose an otherwise unreasonable restraint upon interstate commerce.” Agreements which suppress competition in research and development of technological ideas remain untested under the antitrust laws. Since applying the rule of reason in the context of pollution control would involve difficult questions of public policy, a case-by-case analysis would be necessary. An analogous set of circumstances arose in the case of United States v. National Malleable & Steel Castings Co. In that case, the defendants were accused of violating federal antitrust law by engaging in a patent licensing scheme designed to standardize interchangeable railroad couplers. In upholding the legality of the scheme, the court said:

[The defendants] joined together and fought a little war to save arms, legs, lives, and freight and time . . . . If they didn't have this teamwork for the benefit of our people, they might still be fighting over patent differences; and we might never have perfected a standard interchangeable coupler.

The district court holding in Multidistrict Vehicle Air Pollution stated that a conspiracy among competitors in product research and development does not violate the federal antitrust laws where the participating companies consistently competed in the sale of the product in question. This view ignores the impact of research and development

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39. See generally Pollution Control, supra note 32, at 1322-25.
41. Joint Research, supra note 22, at 1123. See generally Pollution Control, supra note 32, at 1321.
42. See text accompanying notes 30-34 supra.
43. 1957 Trade Cas. ¶ 68,890, at 73,589 (N.D. Ohio), aff'd per curiam, 358 U.S. 38 (1958).
44. Id. at 73,589.

[T]he nuisance is not the result of any conspiracy or combination in restraint of
on pricing, sales, and marketing. In technologically competitive industries "survival is largely dependent upon aggressive R & D programs."\textsuperscript{46}

At most, the competitive marketing of ideas, as opposed to products, is no broader a concept of "trade," as that term is used in the Sherman Act,\textsuperscript{47} than is the concept of "services," which has repeatedly been held to be subject to the federal antitrust laws.\textsuperscript{48}

It is fortunate, therefore, that the Ninth Circuit did not rely on the district court's reasoning in its affirmance of the judgment denying the forms of equitable relief requested.\textsuperscript{49} But the Ninth Circuit also does not state whether or not the conduct of the automakers constituted an antitrust violation and thus leaves an important area of antitrust law yet unexplored. Assuming that anticompetitive activity in pollution control research and development can violate the federal antitrust laws, does the court's remedial analysis of section 16 close all the doors by which the environmental plaintiff might obtain equitable relief? This is the topic of the discussion which follows.

II. Threatened Loss

Since the creation of a right to equitable relief under the Clayton Act,\textsuperscript{50} private parties have not enjoyed the full panoply of common law equitable remedies for federal antitrust violations. By its literal terms, section 16 of the Clayton Act\textsuperscript{51} limits the scope of available private remedies by imposing three proof requirements including: (1) a threat of loss or damage; (2) resulting from a present or future act by defend-

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\bibitem{46} Joint Research, supra note 22, at 1115-16. Moreover, anticompetitive activity in research and development prevents independent inventors from competing and may make products essentially identical and, consequently, less competitively marketed. \textit{Id.} at 1119-20.
\bibitem{47} Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ."
\bibitem{48} Joint Research, supra note 22, at 1117-18 nn.23-25.
\bibitem{49} The Ninth Circuit opinion confined itself to the issue of availability of remedies, holding that the remedies sought under section 16 of the Clayton Act are not available under the unique facts of these cases. 538 F.2d at 234.
\end{thebibliography}
ant; (3) which violates the antitrust laws.\textsuperscript{52} Even assuming that an antitrust violation or threat thereof can be proved, the additional requirement of showing a significant threat of injury from the violation poses difficult and costly obstacles for the private litigant.\textsuperscript{53}

The phrase "threatened loss or damage" includes three concepts. "Loss or damage" has been interpreted to encompass any injury "cognizable in equity" including loss or damage to environmental interests.\textsuperscript{54} A section 16 injury is a much broader concept than that of section 4 of the Act, which limits recovery of damages for harm to "business and property."\textsuperscript{55} Section 16's "loss or damage" requirement must be alleged in terms of a special and particularized injury as opposed to a general public harm.\textsuperscript{56} This is not to say, however, that the public interest is irrelevant to an analysis of private remedies.\textsuperscript{57} Rather, it suggests that private and governmental suits arising out of violations of the antitrust laws fulfill distinct policy goals—a distinction which might account for the remarkable difference between the scope of injunctive

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\item \textsuperscript{52} The text of section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), may be found at note 13 supra.
\item \textsuperscript{53} A Survey of Injunctive Relief, supra note 50, at 363. \textit{See also} Bray v. Safeway Stores, Inc., 1975-1 Trade Cas. ¶ 60,194, at 65,671 (N.D. Cal. 1975).
\item \textsuperscript{54} \textit{See} notes 16-17 \textit{supra} and accompanying text.
\item \textsuperscript{56} \textit{See} United States v. Borden Co., 347 U.S. 514, 518 (1953); Simpson v. Union Oil Co., 311 F.2d 764, 767 (9th Cir. 1963); Union Pac. R.R. v. Frank, 226 F. 906, 909 (8th Cir. 1915).
\item \textsuperscript{57} \textit{See} Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969):
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\item Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." 395 U.S. at 131, \textit{quoting} Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944). Private parties serve as "an ancillary force of private investigators to supplement the Department of Justice in law enforcement." \textit{Note}, \textit{Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act}, 49 MINN. L. REV. 267, 272 n.35 (1964). \textit{In} Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir. 1976), \textit{cert. denied}, 45 U.S.L.W. 3340 (U.S. Nov. 8, 1976), \textit{rev'd} 348 F. Supp. 606 (C.D. Cal. 1972), the Ninth Circuit rejected an analysis by the district court proposing that the requirement of a personal threat of injury be discarded in private divestiture suits. The district court had reasoned that a section 7 divestiture plaintiff serves public policy goals as something of a "class representative" and is therefore entitled to a relaxation of the personal threat requirement. However, contrary to the apparent philosophy of the Ninth Circuit, it is suggested that the primary purpose of all private antitrust remedies should be the fulfillment of "private needs" created by the illegal conduct and not public policy enforcement. \textit{See} note 58 \textit{infra}.}
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relief available to private and governmental entities under the Clayton Act.\textsuperscript{58}

It appears, from the language of section 16, that the "threatened loss or damage" must be of the sort that is continuing or apt to recur in the future.\textsuperscript{60} The plaintiff must prove that there exists at the time of the suit a threat of injury which is something more than an abstract or nebulous plan to violate the law.\textsuperscript{60} Plaintiffs are aided in their heavy burden\textsuperscript{61} by a presumption of continuing conduct drawn from defendant's past antitrust violations.\textsuperscript{62} However, neither past violations nor actual injury is necessary to make a sufficient showing for relief.\textsuperscript{63}

The appellants' request for restitution\textsuperscript{64} in \textit{Multidistrict Vehicle Air Pollution} was denied because it envisioned reimbursement for sums expended in the past and because there was no showing that the expenses were continuing or apt to recur in the future.\textsuperscript{85} In its analysis of pri-


\[\text{[The scheme of the statute [Sherman Act §§ 4, 15, 16] is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages.} \text{Different policy considerations govern each of these.} \text{Id. (emphasis added).} \]

Affirmative equitable remedies such as dissolution and divestiture have been repeatedly granted in governmental suits, while they have generally been denied to private parties suing under section 16. For reference to case authorities, see notes 77-80 \textit{infra} and accompanying text.

\textsuperscript{59} The general rule is that injunctive relief under section 16 issues only upon a showing of continuing or threatened injury. \textit{Zenith Radio Corp. v. Hazeltine Research, Inc.}, 395 U.S. 100, 132 (1969); \textit{International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.}, 518 F.2d 913, 920-25 (9th Cir. 1975); \textit{Credit Bureau Reports, Inc. v. Retail Credit Co.}, 476 F.2d 989, 992 (5th Cir. 1973); \textit{General Fireproofing Co. v. Wyman}, 444 F.2d 391, 393 (2d Cir. 1971). The denial of relief in each of these cases can, however, be justified on the absence of a showing of continuing or threatened antitrust conduct. What then is the result where there is no evidence of continuing or threatened conduct but there is a showing of continuing injury to the environment? The Ninth Circuit in \textit{Multidistrict Vehicle Air Pollution} held that under such facts a remedy will issue under section 16 only if it appears that a granting of the remedy would serve some enforcement goal of the antitrust laws. 538 F.2d at 235.


\textsuperscript{61} See note 53 \textit{supra}.


\textsuperscript{63} \textit{See Zenith Radio Corp. v. Hazeltine Research, Inc.}, 395 U.S. 100, 130 (1969), and cases cited therein.

\textsuperscript{64} See note 9 \textit{supra} for a description of the restitutionary remedy sought by appellants.

\textsuperscript{65} 538 F.2d at 236. This reasoning by the court does not take into consideration
vate affirmative relief under section 16, the Ninth Circuit, in the instant case, appears to support the view that the scope of remedies available under section 16 is as broad as necessary to serve the enforcement purposes of the antitrust laws. Depriving the antitrust violator of the gains of illegal conduct, the court stated, is a proper basis upon which to formulate equitable antitrust remedies. Also, in Schine Chain Theatres, Inc. v. United States, the Supreme Court stated that restitutionary relief is one method of depriving a defendant of the gains of his antitrust conduct. It has not been an uncommon occurrence in equity suits involving protection of the public interest for courts to permit compensatory or restitutionary recovery where the federal statute did not specifically provide for it. Therefore, it is somewhat disconcerting that the circuit court would rely on a technical reading of the statute, unnecessary to its judgment, as a basis for dismissing the restitution request.

The result in Multidistrict Vehicle Air Pollution need not, however, mean death to all future private party claims for restitution under the Clayton Act. An equity court has the power, once jurisdiction is obtained, to decide all matters in dispute and to award complete relief, even though the decree includes that which might be conferred by a court of law. A successful claim for injunctive relief under section the fact that although the expenses were incurred in the past, they were incurred for the purpose of preventing future and continuing environmental injury. The statute is expressly applicable to the prevention of continuing or threatened injury. 66. Id. See text accompanying notes 98-9 infra. 67. 538 F.2d at 236. 68. 334 U.S. 110, 128-29 (1948). 69. See Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (restitution to the federal government for performing a duty imposed by the Rivers and Harbors Act of 1899); Mitchell v. De Mario Jewelry, Inc., 361 U.S. 288 (1960) (ordering payments of wages to employees discharged in violation of Fair Labor Standards Act); United States v. Moore, 340 U.S. 616 (1951) (restitution of rent overcharges in violation of Housing and Rent Act of 1947); Porter v. Warner Holding Co., 328 U.S. 395 (1946) (restitution of rent overcharge in violation of Emergency Price Control Act); Walling v. O'Grady, 146 F.2d 422 (2d Cir. 1944) (ordering payments of wages to employees discharged in violation of Fair Labor Standards Act). These cases were unsuccessfully argued by appellants in Multidistrict Vehicle Air Pollution. Brief for Appellants at 27 et seq., In re Multidistrict Vehicle Air Pollution v. Automobile Mfrs. Ass'n, 538 F.2d 231 (9th Cir. 1976). 70. The Ninth Circuit stated, as additional grounds for dismissal, that appellants' request was not truly one for restitution because there was no allegation that the automakers had received any money from the car owners to which they were not entitled. 538 F.2d at 234. The court might also have denied restitution on the grounds of the impracticability of administering the reimbursement program. See Boise Cascade Int'l, Inc. v. North Minn. Pulpwood Producers Ass'n, 294 F. Supp. 1015 (D. Minn. 1968). 71. Alexander v. Hillman, 296 U.S. 222, 241-42 (1935).
16 of the Clayton Act, though not achieved by the appellants in the instant case, should provide a basis for restitution in spite of the statute's limiting language. Furthermore, since restitution can be obtained through an action at law as well as in equity, section 4 of the Clayton Act would be an alternative course by which to assert a right to restitution.

III. Continuing Conduct and Antitrust Goals

Section 16 of the Clayton Act permits private litigants to "have injunctive relief ... when and under the same conditions and principles as injunctive relief against threatened conduct ... is granted by courts of equity ... ." Ostensibly, the section's reference to "threatened conduct" would limit the choice of remedies to preventive relief only.

The appellants in Multidistrict Vehicle Air Pollution sought affirmative relief in the form of a retrofit remedy to prevent further pollutant emissions from autos under-equipped with pollution control devices as a result of the alleged antitrust conspiracy. The Ninth Circuit, presumably in the belief that it is best to withhold decision on issues unnecessary to reaching a judgment, noted but declined to decide whether section 16 excludes all forms of affirmative equitable relief for private parties.

Governmental antitrust enforcement statutes, like section 16, are couched in language which appear to limit them to the grant of preventive remedies only. However, the use of affirmative relief in governmental antitrust suits is a well-established practice. The issue of an

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75. 538 F.2d at 235 n.6. For a discussion of the grounds relied on to deny the mandatory retrofit remedy, see text accompanying notes 94-96 infra.
implied right to affirmative relief under section 16 has arisen in the con-
text of private actions for dissolution or divestiture of corporate entities
operated or merged in violation of the antitrust laws. A diversity of
views has resulted, with the Ninth Circuit handing down a comprehensive
analysis of the issue in *International Telephone & Telegraph Corp. v.
General Telephone & Electronics Corp.* The holding in that case
deprives private parties of a right to the remedy of divestiture.

In *Multidistrict Vehicle Air Pollution* the Ninth Circuit indicated that
its holding in *International Telephone* might be limited to suits for di-
vestiture or dissolution. The court's caution may have been prompted
by recent criticism leveled at the *International Telephone* decision. In
*NBO Industries Treadway Cos., Inc. v. Brunswick Corp.*, the Third
Circuit chastised the Ninth Circuit's reliance on legislative history over
sixty years old to guide their "contemporary application of a statute
laying down a fundamental national economic policy." The *Interna-
tional Telephone* decision should be narrowly construed in view of the
especially drastic nature of divestiture and dissolution remedies. As
has been already suggested, private and governmental antitrust suits
under the Clayton Act serve differing purposes. The distinct role of
the Department of Justice in protecting the public interest from the

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78. See generally Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267 (1964). For a list of decisions favoring and refusing private divesti-
ture actions see NBO Indus. Treadway Co., Inc. v. Brunswick Corp., 1975-2 Trade Cas. ¶ 60,479, at 67,128 n.17 (3rd Cir.).
79. 518 F.2d 913 (9th Cir. 1975).
80. Id. at 920-25. The Supreme Court has let stand the Ninth Circuit view that
divestiture is not available to private litigants. Calnetics Corp. v. Volkswagen of
America, Inc., 45 U.S.L.W. 3340 (U.S. Nov. 8, 1976), denying cert. to 532 F.2d 674
(9th Cir. 1976).
81. 538 F.2d at 235 n.6.
82. 1975-2 Trade Cas. ¶ 60,479, at 67,128-29 (3rd Cir.).
83. Id. at 67,128-29.
84. In the Supreme Court opinion of *Timken Roller Bearing Co. v. United States*,
341 U.S. 593 (1951), Justice Reed's concurrence reflects his concern with the severity
and potential abuse of the divestiture remedy:

Since divestiture is a remedy to restore competition and not to punish those who
restrain trade, it is not to be used indiscriminately, without regard to the type of
violation or whether other effective methods, less harsh, are available. That judicial
restraint should follow such lines is exemplified by our recent rulings in *United
States v. National Lead Co.*, where we approved divestiture of some properties
belonging to the conspirators and denied it as to others. . . .

Id. at 603 (citation omitted).
85. See notes 57-58 *supra* and accompanying text.
effects of antitrust violations would permit its use of extreme remedies which might not be otherwise warranted in a private action. Conversely, where the affirmative remedy requested by a private party is well trimmed to the needs of the particular injury alleged, section 16 should be flexibly read to permit the issuance of appropriate affirmative injunctions.\textsuperscript{86}

Affirmative injunctions to control voting rights of shareholders\textsuperscript{87} and to divest rights of public performance for profit\textsuperscript{88} have been granted upon a showing of continuing or threatened conduct against which a preventive injunction has issued in the same action. No court has yet given affirmative relief under section 16 where it is the sole remedy sought, although dicta in several cases have indicated that such relief would be available to private parties.\textsuperscript{89} In Multidistrict Vehicle Air Pollution the court emphasized that a remedy under the antitrust laws may be obtained if the remedy would have the additional effect of ending an ongoing violation.\textsuperscript{90} It is arguable that this reasoning permits the tacking of an affirmative injunction onto a request for preventive relief enjoining continuing or threatened antitrust conduct.

Quoting from Schine Chain Theatres, Inc. v. United States,\textsuperscript{91} the Ninth Circuit announced a new standard for fashioning private equitable remedies under section 16. The form of relief sought must further one or more of the enforcement goals of the antitrust laws, including: (1) terminating ongoing antitrust conduct; (2) depriving violators of the benefits of their illegal conduct; or (3) restoring competition to the marketplace.\textsuperscript{92} The antitrust laws are not, the court stated, a broad license to promote the general welfare through eliminating air pollution\textsuperscript{93} but are designed to accomplish specific goals related to the competitive sys-

\textsuperscript{86} One writer has suggested that affirmative injunctive relief should always be available to protect the private plaintiff from future loss or damage from violation of the antitrust laws. A Survey of Injunctive Relief, supra note 50, at 366.

\textsuperscript{87} Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953).


\textsuperscript{89} See note 78 supra.

\textsuperscript{90} 538 F.2d at 236.

\textsuperscript{91} 334 U.S. 110 (1948).

\textsuperscript{92} 538 F.2d at 234-35. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948), involved a governmental antitrust suit. The antitrust goals recited therein do not, therefore, include goals of compensation or reparation of private injuries. According to the Ninth Circuit in the instant case, these latter goals are covered by section 4 of the Clayton Act, 15 U.S.C. § 15 (1970). There is not, however, any authority for such a policy distinction between sections 4 and 16 of the Clayton Act.

\textsuperscript{93} Id.
tem. The retrofit remedy could not be justified under this standard because no ongoing antitrust conduct was alleged, the benefits reaped from the conspiracy were indefinite and therefore incapable of being translated into a public compensation program, and restoration of injuries to the environment has no reparative effect on the competitive system. The private injured party must state facts which would tie the remedy sought into the accomplishment of one or more of these goals. If this cannot be done, the party must attempt to find redress under the more restrictive provisions of section 4 of the Act or, as in the instant case, stand remediless.

The Ninth Circuit's analysis is in accord with other decisions limiting federal equity jurisdiction to accord with the policy of the legislature. In *Mitchell v. De Mario Jewelry, Inc.*, the Supreme Court ordered the payment of wages to employees discharged in violation of the Fair Labor Standards Act, despite the fact that the remedy was unprecedented under the statute, on the basis that the result was consistent with the "historic power of equity to provide complete relief in light of the statutory purposes." In addition to the enforcement purposes recited by the Ninth Circuit, there is the additional purpose of curing the illegal effects of antitrust conduct. Restitutionary or affirmative remedies have the effect of curing the private injuries which result from an antitrust violation. Assuming that section 16 is not limited to preventive remedies only, the rule of *Multidistrict Vehicle Air Pollution* would permit reparative relief exclusively in cases where the harm suffered is related to the restoration of competition. Whether or not such an injury is broader or narrower than the "business or property" requirement of section 4 of the Clayton Act is not explained by the instant decision. However, because the Ninth Circuit conceded that private suits for damages under section

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94. Id.
95. The court in *Multidistrict Vehicle Air Pollution* noted that the small financial benefits, if any, reaped by the automakers were incapable of being translated into a value equivalent for purposes of retrofit. 538 F.2d at 236 n.7. There are, however, tangible benefits which accrue to the auto industry through successful suppression of pollution control research. They are discussed in *Automobile Pollution*, supra note 7, at 439-41.
96. 538 F.2d at 236.
97. See note 55 supra and accompanying text.
99. Id. at 292 (1960) (emphasis added), citing Clark v. Smith, 38 U.S. (13 Pet.) 195, 203 (1839) for the similar proposition that "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature."
101. See notes 85-87 supra and accompanying text.
4 of the Clayton Act serve the antitrust goal of curing the effects of the illegal conduct, it is logical that a showing of injury to "business or property" should satisfy the new "restoration of competition" standard of section 16. This reasoning would not have saved appellants' claim in the instant case because noneconomic (environmental) injuries were alleged. Environmental litigants would do well to frame their equitable antitrust remedies in terms of the economic impact of pollution.

IV. CONCLUSION

The Ninth Circuit rulings leading up to and including its holding in Multidistrict Vehicle Air Pollution denote both an expansion and contraction of the parameters of section 16. Injured parties are restricted in their choice of remedies by the requirement that the remedy serve to further specific enforcement goals. To the extent that nonpreventive remedies can be obtained in the future, the injury must at least be one which is tantamount to the "business and property" interests of section 4. On the other hand, persons injured by reason of an antitrust violation have standing to obtain preventive relief on the basis of threatened noneconomic injury. Arguably, such injured parties may demand other relief which, in addition to furnishing a preventive remedy, would adequately compensate victims of the antitrust activities. The result is a substantial grant of power for environmentalists prospectively to bring pressure to bear on industries which illegally suppress competition in the research and production of pollution control measures.

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